

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID AVILA, et al,

Plaintiffs,

v.

NEWREZ, LLC D/B/A SHELLPOINT
MORTGAGE SERVICING, et al.,

Defendants.

Case No. 2:24-cv-02264-TLN-CSK

FINDINGS AND RECOMMENDATIONS
GRANTING DEFENDANT PEAK
FORECLOSURE SERVICES INC.'S
AMENDED MOTION TO SET ASIDE

(ECF No. 43)

Plaintiffs David Avila and John Hayne are proceeding in this action pro se.¹

Pending before the Court is Defendant Peak Foreclosure Services Inc.'s amended motion to set aside default pursuant to Federal Rules of Civil Procedure 55(c). Def. Am. Mot. (ECF No. 43.) Plaintiffs have not filed an opposition to the motion. See Docket. Finding no hearing necessary, the matter was taken under submission by the undersigned. (ECF No. 45.) For the reasons that follow, the Court recommends GRANTING Defendant's amended motion to set aside default.

I. BACKGROUND

Plaintiffs filed their Complaint on August 21, 2024. (ECF No. 1.) On September 23, 2024, Plaintiffs filed their proof of service as to Defendant Peak Foreclosure

¹ This matter proceeds before the undersigned pursuant to 28 U.S.C. § 636, Fed. R. Civ. P. 72, and Local Rule 302(c).

1 Services. (ECF No. 9.) On November 27, 2024, Plaintiffs requested entry of default as to
2 Defendant Peak Foreclosure Services (ECF No. 32), and the Clerk's entry of default was
3 entered on December 2, 2024 (ECF No. 34). Defendant Peak Foreclosure Services
4 moved to set aside the Clerk's entry of default on December 31, 2024 and noticed it for
5 hearing before the assigned District Judge. (ECF No. 39.) On January 2, 2025, the
6 hearing on the motion was vacated by the assigned District Judge. (ECF No. 40.) On
7 January 20, 2025, Defendant Peak Foreclosure Services filed an amended motion to set
8 aside default and again noticed it before the assigned District Judge. (ECF No. 43.) On
9 January 21, 2025, the hearing on the amended motion was again vacated by the
10 assigned District Judge. (ECF No. 44.) On February 7, 2025, the undersigned took the
11 amended motion under submission after no opposition or statement of non-opposition by
12 Plaintiffs was filed. (ECF No. 45.)

13 **II. LEGAL STANDARDS**

14 The Federal Rules of Civil Procedure provide that “[t]he Court may set aside an
15 entry of default for good cause.” Fed. R. Civ. Proc. 55(c). A court’s discretion is
16 especially broad where an entry of default is being set aside, rather than a default
17 judgment. *O’Connor v. State of Nev.*, 27 F.3d 357, 364 (9th Cir. 1994) (quoting *Mendoza*
18 *v. Wight Vineyard Mgmt.*, 783 F.2d 941, 945 (9th Cir. 1986)). “To determine ‘good
19 cause’, a court must ‘consider[] three factors: (1) whether [the party seeking to set aside
20 the default] engaged in culpable conduct that led to the default; (2) whether [it] had [no]
21 meritorious defense; or (3) whether reopening the default judgment would prejudice’ the
22 other party.” *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d
23 1085, 1091 (9th Cir. 2010) (citing *Franchise Holding II, LLC. v. Huntington Restaurants*
24 *Grp., Inc.*, 375 F.3d 922, 925-26 (9th Cir. 2004)). These factors are disjunctive, such that
25 the court may deny the motion if any of the three factors are true. *Franchise Holding II,*
26 *LLC.*, 375 F.3d at 926.

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1 **III. DISCUSSION**

2 The Court finds good cause to set aside Defendant Peak Foreclosure Services'
3 entry of default. The Court addresses each of the factors below.

4 **A. Culpable Conduct**

5 The Court finds that Defendant Peak Foreclosure Services did not engage in
6 culpable conduct. "A defendant's conduct is culpable if he has received actual or
7 constructive notice of the filing of the action and intentionally failed to answer....[I]n this
8 context the term 'intentionally' means that a movant cannot be treated as culpable simply
9 for having made a conscious choice not to answer; rather, to treat a failure to answer as
10 culpable, the movant must have acted with bad faith, such as an intention to take
11 advantage of the opposing party, interfere with judicial decision making, or otherwise
12 manipulate the legal process." *Mesle*, 615 F.3d at 1092 (internal citations omitted).

13 Defendant Peak Foreclosure Services argues it was "never served with Plaintiffs'
14 Summons and Complaint, and became aware of Plaintiff[s]' such filing upon receipt of
15 the Court's Notice of entry of the 12/2/2024 Default." Def. Am. Mot. at 5. Defendant Peak
16 Foreclosure Services further argues the proof of service is defective on its face and
17 therefore void because it does not list the individual served. *Id.* Defendant is correct.
18 Review of the proof of service on Defendant Peak Foreclosure Services indicates
19 personal service was completed on August 13, 2024 at 3:34 p.m. at 5900 Canoga
20 Avenue, Suite 220, Woodland Hills, CA 91367. (ECF No. 9 at 1.) However, the proof of
21 service does not indicate the individual that was served. Federal Rule of Civil Procedure
22 4(h) governs the specific requirements for service of process on a corporation within a
23 judicial district. Fed. R. Civ. P. 4(h). Under Rule 4(h)(1), a corporation can be served:
24 "(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or (B) by
25 delivering a copy of the summons and the complaint to an officer, a managing or general
26 agent, or any other agent authorized by appointment or by law to receive service of
27 process and-if the agent is one authorized by statute and the statute so requires-by also
28 mailing a copy of each to the defendant." Fed. R. Civ. P. 4(h)(1)(A)-(B). Because the

1 Court cannot determine whether service was properly effectuated against Defendant
2 Peak Foreclosure Services and because Defendant Peak Foreclosure Services argues it
3 was never served with the summons, the Court finds Defendant Peak Foreclosure
4 Services was not culpable for the default.

5 **B. Potentially Meritorious Defenses**

6 Defendant Peak Foreclosure Services requests the entry of default be vacated so
7 that it “may properly defend this proceeding under the Federal Rules of Civil Procedure.”
8 Def. Am. Mot. at 5. This action arises from a mortgage foreclosure of a real property.
9 (ECF No. 1.) Although this Court is recommending that this case be dismissed for failure
10 to state a claim and for lack of subject matter jurisdiction (ECF No. 36), default against
11 Defendant Peak Foreclosure Services is not appropriate where service was not proper.

12 **C. Prejudice to Plaintiffs**

13 Finally, setting aside the entry of default will not prejudice Plaintiffs. Plaintiffs have
14 not shown prejudice and have not filed an opposition or statement of non-opposition to
15 the motion. Moreover, Defendant Peak Foreclosure Services promptly moved to set
16 aside the entry of default.

17 For all these reasons, the amended motion to set aside default should be granted.

18 **IV. CONCLUSION**

19 Based upon the findings above, it is RECOMMENDED:

- 20 1. Defendant Peak Foreclosure Services’ amended motion to set aside
21 default (ECF No. 43) be GRANTED; and
22 2. The Clerk of the Court be directed to set aside Defendant Peak
23 Foreclosure Services Inc.’s entry of default.

24 These findings and recommendations are submitted to the United States District
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
26 14 days after being served with these findings and recommendations, any party may file
27 written objections with the Court and serve a copy on all parties. This document should
28 be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any

1 reply to the objections shall be served on all parties and filed with the Court within 14
2 days after service of the objections. Failure to file objections within the specified time
3 may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449,
4 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

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6 Dated: March 10, 2025


7 CHI SOO KIM
8 UNITED STATES MAGISTRATE JUDGE

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